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August 14, 2019

**Via ECFS**

Marlene J. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 - 12th Street, SW  
Washington, DC 20054

**Re: Commonwealth Edison Company's Application for Review (Proceeding  
Numbers 19-169, 19-170; Bureau ID Numbers EB-19-MD-004, EB-19-  
MD-005)**

Dear Ms. Dortch:

Please find attached Commonwealth Edison Company's Application for Review to be  
filed in the above referenced proceedings.

Please contact the undersigned counsel if you have any questions regarding this  
submission.

Sincerely,



Kathleen M. Slattery  
Attorney for Commonwealth Edison Company

Enclosure

cc: Rosemary McEnery, Enforcement Bureau  
Lisa Saks, Enforcement Bureau  
Adam Suppes, Enforcement Bureau  
Anthony DeLaurentis, Enforcement Bureau

<p><b>Crown Castle Fiber LLC,</b>  <i>Complainant,</i></p> <p style="text-align: center;"><b>v.</b></p> <p><b>Commonwealth Edison Company,</b>  <i>Defendant</i></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Proceeding Numbers</b> <b>19-169</b>  <b>19-170</b></p> <p><b>Bureau ID Numbers</b> <b>EB-19-MD-004</b>  <b>EB-19-MD-005</b></p>
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# COMMONWEALTH EDISON COMPANY'S APPLICATION FOR REVIEW

*Attorneys for  
Commonwealth Edison Company*

Dated: August 14, 2019

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

<b>Crown Castle Fiber LLC,</b> <i>Complainant,</i>	)	
	)	
	)	
	)	
	)	<b>Proceeding Numbers 19-169</b>
	)	<b>19-170</b>
<b>v.</b>	)	<b>Bureau ID Numbers EB-19-MD-004</b>
	)	<b>EB-19-MD-005</b>
<b>Commonwealth Edison Company,</b>	)	
<i>Defendant</i>	)	

TO: THE COMMISSION

**APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. § 1.115, Commonwealth Edison Company (“ComEd”) respectfully requests that the Federal Communications Commission (“FCC” or “Commission”) review the July 15, 2019 Order by the Chief, Enforcement Bureau in the above-captioned proceedings (“Order”), denying ComEd’s Motion To Dismiss these pole attachment complaints for lack of federal jurisdiction.<sup>1</sup> The Order raises a question of law not definitively resolved by the Commission, reaches a result contrary to FCC rules and the federalism imperative of the statute, and creates substantial uncertainty for the pole attachment regime.

**SUMMARY**

Complainant Crown Castle Fiber LLC has filed two pole attachments complaints with the FCC, even though the Illinois Commerce Commission has filed and the FCC has accepted certifications with the FCC that the state regulates pole attachments. The Enforcement Bureau

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<sup>1</sup> A copy of the Order is attached hereto at Exhibit A.

denied ComEd's Motion to Dismiss for lack of jurisdiction, finding that a letter from the ICC stating that its rules did not "specifically" address telecommunications provider attachments meant that the FCC had jurisdiction.

The FCC's rules, however, clearly provide that a certification once filed is "conclusive proof" of state jurisdiction and that the FCC "shall" dismiss any complaint filed at the federal level. 47 C.F.R. § 1.1405(a). The ICC's letter did not withdraw its previous certification, and the ICC's rules are, in fact, broad enough to allow entertain Crown Castle's complaint. Requiring Crown Castle to file first with the ICC would respect the federalism values of the statute and would allow ComEd the opportunity to contest the ICC's letter (which it previously has not had at the state level). Moreover, any FCC decision to accept complaints to be initially filed with it, notwithstanding an effective state certification, would inject substantial uncertainty into the pole attachment regime.

### **QUESTION PRESENTED**

Whether the Illinois Commerce Commission ("ICC") has jurisdiction over these pole attachment complaints, where the ICC has filed certifications of state regulation which the FCC has recognized and which FCC regulations provide are "conclusive proof" of state jurisdiction (47 C.F.R. § 1.1405(a)), notwithstanding that the ICC has recently stated that its regulations do not "specifically" cover pole attachment requests by telecommunications providers.

### **BACKGROUND**

ComEd is an Illinois electric utility, subject to regulation by the Illinois Commerce Commission, and it owns or controls utility poles in Illinois. Order at ¶ 1. On June 19, 2019, Crown Castle Fiber LLC ("Crown Castle"), a company claiming to be a telecommunications

provider under ICC authority, filed with the FCC two pole attachment complaints.<sup>2</sup> These complaints assert that ComEd has denied access and overcharged for access to its utility poles. *Id.* The complaints seek more than \$15 million in refunds.<sup>3</sup> Crown Castle claims to be operating pursuant to certain pole attachment agreements with ComEd, the longest of which have been in effect for more than 10 years.<sup>4</sup>

The FCC has long recognized Illinois as a state that has certified its regulation of pole attachments, triggering the reverse-preemption provisions of the federal pole attachment statute. 47 U.S.C. § 224(c). Illinois filed its first certification with the Commission in 1978.<sup>5</sup> This certification stated:

The Illinois Commerce Commission of the State of Illinois does regulate rates, terms, and conditions for pole attachments to the poles, ducts, conduits, or right-of-ways owned or controlled by public utilities, as defined in the Illinois Public Utilities Act, and in so regulating such rates, terms, and conditions the State of Illinois through the Illinois Commerce Commission has the authority to consider and does consider the interests of the subscribers of cable television services in Illinois as well as the interests of consumers of utility services in Illinois.<sup>6</sup>

Illinois has adopted regulations governing the rates, terms, and conditions applicable to (at least) cable television company attachments to electric utilities and local exchange telecommunications carriers. 83 Ill. Admin. Code, part 315.

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<sup>2</sup> Crown Castle Fiber LLC v. Commonwealth Edison Co., Pole Attachment Complaint for Denial of Access, FCC Docket No. 19-169 (filed June 19, 2019) (“Denial of Access Complaint”); Crown Castle Fiber LLC v. Commonwealth Edison Co., Pole Attachment Complaint – Unlawful Rates, FCC Docket No. 19-170 (filed June 19, 2019) (“Rates Complaint”).

<sup>3</sup> See Denial of Access Complaint, *supra* note 1, at ¶¶ 196, 198; Rates Complaint, *supra* note 1, at ¶¶ 97, 98.

<sup>4</sup> See Denial of Access Complaint, *supra* note 1, at ¶¶ 23-26; Rates Complaint, *supra* note 1, at ¶¶ 23-25.

<sup>5</sup> *In the Matter of Public Utility Pole Attachments for Cable Television Services Pursuant to Amendment of the Communications Act of 1934, Set Forth in Section 224(c) Paragraphs (1) and (2)*, Illinois Commerce Commission, 78-R4 (Apr. 5, 1978) (available at <https://ecfsapi.fcc.gov/file/7020456679.pdf>), attached hereto at Exhibit B.

<sup>6</sup> *Id.*

Illinois renewed its certification to the FCC in 1985.<sup>7</sup> This certification stated: “The Illinois Commerce Commission of the State of Illinois does regulate rates, terms, and conditions for pole attachments to the poles, ducts, conduits, or right-of-ways owned or controlled by public utilities, as defined in the Illinois Public Utilities Act, and in so regulating such rates, terms, and conditions the State of Illinois through the Illinois Commerce Commission has the authority to consider and does consider the interests of the subscribers of cable television services in Illinois as well as the interests of consumers of utility services in Illinois.”<sup>8</sup>

On several occasions, the FCC has recognized the ICC’s certification and has stated that Illinois has jurisdiction over pole attachment complaints. Appendix C to the April 2011 Pole Attachment Order included Illinois among its list of states that “have certified that they regulate rates, terms, and conditions for pole attachments.”<sup>9</sup> The FCC has issued similar certifications on several occasions – and has never withdrawn the certification.<sup>10</sup>

Notwithstanding its prior certifications, accepted by the FCC, the Illinois Commerce Commission on December 12, 2018, forwarded to the FCC Secretary a letter stating that “the Illinois Commerce Commission has not adopted any rules or regulations specifically governing rates, terms, or conditions for attachments by *telecommunications* companies to poles owned by electric utilities and therefore lacks regulatory authority over attachments by *telecommunications*

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<sup>7</sup> See WC Docket 10-101, States That Have Certified That They Regulate Pole Attachments, State of Illinois, Commerce Commission, May 24, 1985, (available at <https://ecfsapi.fcc.gov/file/7020456531.pdf>), attached hereto as Exhibit C.

<sup>8</sup> *Id.*

<sup>9</sup> Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, at Appendix C (2011) (“April 2011 Pole Attachment Order”) (“States That Have Certified That They Regulate Pole Attachments”).

<sup>10</sup> See, e.g., States That Have Certified That They Regulate Pole Attachments, Public Notice, DA No. 92-201, 7 FCC Rcd 1498 (1992); Corrected List of States That Have Certified That They Regulate Pole Attachments, Public Notice, DA No. 08-653, 23 FCC Rcd 4878 (2008); States That Have Certified That They Regulate Pole Attachments, Public Notice, DA No. 10-893, 25 FCC Rcd 5541 (2010).

companies to poles owned by electric utilities.”<sup>11</sup> The ICC said that the rules in the Illinois Administrative Code “apply to attachments by ‘cable television (“CATV”) companies’ to electric utilities and local exchange telecommunications carriers and omit any mention of attachments by *telecommunications* companies.” *Id.* at 1-2 (quoting 83 Ill. Admin. Code § 315.30). The ICC did say that it had adopted regulations governing telecommunications carriers’ attachment to local exchange carriers’ poles. *Id.* at 2. And the ICC also said that it possessed the statutory authority to adopt additional rules governing electric utilities: the ICC specifically “reserve[d] the right to promulgate effective rules and regulations over telecommunications companies’ attachments to poles owned by electric utilities in the future.” *Id.*

The ICC Letter had been adopted by the Illinois Commission at a meeting on October 25, 2018.<sup>12</sup> But the Letter was not the culmination of a rulemaking or an adjudicatory proceeding. The ICC did not give public notice of the letter, and the ICC did not seek public comment.<sup>13</sup> Of course, the ICC received no comments.

Crown Castle filed its complaints with the FCC on June 19, 2019. ComEd immediately moved to dismiss both of Crown Castle’s complaints, arguing that Commission regulations provided that the ICC’s certifications (and the FCC’s prior acceptance of those certifications) constituted “conclusive proof” that the FCC lacked jurisdiction. ComEd also argued that the ICC’s rate regulations were, by their own terms, broad enough to cover all attachments to electric utility company poles, even if the regulations were adopted prior to the 1996 Act

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<sup>11</sup> Letter from Brian Sheehan, Chair, Illinois Commerce Commission at 1 (letter dated Oct. 25, 2018) (transmitted Dec. 12, 2018), attached hereto as Exhibit D. (The Letter was attached to Crown Castle’s Access Complaint, *supra* note 1, at Ex. B, and to the Rates Complaint as Ex. C.)

<sup>12</sup> The Transcript of the meeting item is attached hereto as Exhibit E. (The Transcript was attached to Crown Castle’s Access Complaint, *supra* note 1, as Ex. C, and to the Rates Complaint as Ex. D.)

<sup>13</sup> The ICC in its public agenda included as a miscellaneous item, “Letter to the Federal Communication Commission Regarding Authority Over Telecommunications Attachments.” But the ICC did not publish or summarize the draft letter.



amendments bringing telecommunications companies within the scope of section 224. ComEd demonstrated that accepting Crown Castle’s argument would create substantial uncertainty, because (like Illinois) other states have not updated their rules since the 1996 Act and because allowing arguments of state law “gaps” in regulation would multiply litigation. In this regard, ComEd noted that the parties – both Crown Castle and ComEd – and the Illinois Commission had previously behaved as if Illinois had jurisdiction over the matters at issue in the complaints.<sup>14</sup>

In its July 15, 2019 Order, the Chief, Enforcement Bureau denied the Motions to Dismiss. The brief Order states two rationales. First, despite the language of 1.1405(b)(3) stating that a certification was “conclusive proof” of jurisdiction, the Order stated that the certification was only a “rebuttabl[e]” presumption. Order at 2 (¶ 3). The Order accepted the ICC’s view that it lacked jurisdiction over Crown Castle’s complaints. *Id.* Second, the Order said that enforcing the FCC’s regulation would “simply delay the inevitable result of jurisdiction reverting back to the Commission.” *Id.* at 3 n.19 (¶ 5). Although the Order did not spell out its reasoning, the Order seems to assume that the ICC would dismiss a complaint filed in Illinois, returning Crown Castle to the FCC.

## **ARGUMENT**

The Commission should review the Order below and reverse the decision. The Order presents a question not previously determined by the Commission, and the Order contradicts the FCC’s rules. The language of the regulation is unequivocal: an effective state certification is “conclusive proof” that the FCC lacks jurisdiction. The ICC’s December 2018 Letter does not withdraw the certification, and the FCC has not itself rescinded its recognition. The FCC’s rules do allow the parties to dispute jurisdiction in cases in which a certification is lacking, and they

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<sup>14</sup> See Commonwealth Edison Co.’s Motion to Dismiss for Lack of Jurisdiction, FCC Docket Nos. 19-169, 19-170 (filed June 28, 2019).

allow the FCC to assert jurisdiction if a state fails to resolve a pole attachment complaint within the specified time. But neither of these situations applies here.

Moreover, allowing complaints such as Crown Castle's to proceed would severely harm the strong federalism values reflected in section 224 and create significant uncertainty. Plaintiffs could seek to litigate the coverage and effectiveness of state law at the FCC without first resorting to state procedures. In this case, even the ICC's letter admits that Commission has the statutory authority over this situation, and some of its regulations are broad enough to be applied to Crown Castle's complaints. The Order below creates uncertainty in those several states that have not adopted new regulations since the 1996 Act – something the FCC has not said states must do. No strong policy reason counsels in favor of expanding FCC jurisdiction and litigation. Although resolving any asserted gaps may take a short period, section 224 prioritizes private negotiation and state resolution of pole attachment issues. The FCC is – and should remain – a last resort.

**A. The Order Is Contrary to FCC Rules**

**1. The Rules Require Dismissal Where a Certification Has Been Filed**

The Communications Act withholds FCC jurisdiction over pole attachments in circumstances in which “such matters are regulated by a State.” 47 U.S.C. § 224(c)(1). The language is strong – stating that “[n]othing in this section shall be construed” to give the FCC jurisdiction where the states regulate. *Id.* And the federal Act gives states the power to “certify” their own compliance with section 224. *See* § 224(c)(2). Moreover, the FCC has consistently recognized Congress's intent that the states have primacy in the field of pole attachments. *See, e.g., Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utilities Elec. Co.*, 6 FCC Rcd 7099, 7101 (1991) (“Congress intended federal involvement in pole attachment regulation to be interstitial in nature; the Commission's mandate is to fill the regulatory vacuum created when

individual states do not regulate pole attachments.”), *aff’d*, *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 247–48 (1987) (same). “The Committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various state and local regulatory bodies are better equipped to regulate CATV pole attachments.” S. Rep. No. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1977, *reprinted in* 1978 USCCAN 109, 125.

The FCC’s regulations implementing section 224(c) give force to the statutory certification regime when they provide that a pole attachment “complaint *shall* be dismissed for lack of jurisdiction where a suitable certification has been filed by a State ....” 47 C.F.R. § 1.1405(a) (emphasis added). The very next sentence of the rule says: “Such certificate shall be *conclusive proof* of lack of jurisdiction of this Commission. *Id.* (emphasis added). “Shall” is “mandatory” language. *E.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“the mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion”). And “conclusive proof” is plain as well. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (noting that a presumption is “not a conclusive one” if it is “rebuttable”); *Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985) (“A mandatory presumption may be either conclusive or rebuttable.”).<sup>15</sup> Thus, contrary to the Enforcement Bureau’s Order, nothing in the FCC rule permits the presumption to be rebutted. *Compare* Order at 2 (¶ 3). Rather, the balance of subsection (a) gives a defendant an alternative means of demonstrating reverse preemption – by showing that a state regulates in circumstances in which no certificate

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<sup>15</sup> The 1977 Senate Report uses the “conclusive” language as well: “The bill as reported makes clear that the Commission shall be foreclosed from regulation with respect to pole attachments in any state which has so certified to the Commission. Receipt of such a certification from the state shall be conclusive upon the Commission.” S. Rep. No. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1977, *reprinted in* 1978 USCCAN 109, 125.

has been filed. 47 C.F.R. § 1.1405(a). Subsection (b) merely defines what is a “suitable certificate,” in terms of the statutory requirements. *Id.* § 1.1405(b).<sup>16</sup>

The Order does not deny that the ICC’s 1978 and 1985 certifications were “suitable.” The 1978 certification stated each of the conditions required at the time by saying that the state regulated “rates, terms, and conditions for pole attachments” and that the state “has the authority to consider and does consider the interests of the subscribers of cable television services in Illinois as well as the interests of consumers of utility services in Illinois.” Ex. B. The reference is to “the interests of the subscribers of cable television services” rather than “the interests of the consumers of the services offered via such attachments” because at the time of Illinois’s certification, that was the precise language required.<sup>17</sup> The 1985 certification similarly tracked the statutory and regulatory requirements. *See supra* p. 3; Ex. C.

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<sup>16</sup> The Order does not purport to grant a waiver from the “conclusive” effect of a certification under 47 C.F.R. 1.1405(a). Although the order cites to 47 C.F.R. § 1.3, the Order does not articulate the “good cause” necessary to grant a waiver of a rule.

<sup>17</sup> Prior to the passage of the *1996 Act*, the language of Section 224(c)(2) included a reference to State authority to consider the interests of the subscribers of cable television services. That language was revised by the *1996 Act* to reference State authority to consider the interests of the subscribers of the services offered via [pole attachments]. Section 224(c)(2) originally stated:

Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that –

- (A) it regulates such rates, terms, and conditions; and
- (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

The language was revised to the following:

Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that –

- (A) it regulates such rates, terms, and conditions; and
- (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the

Confirming that the ICC’s 1978 and 1985 certifications were “suitable,” Appendix C to the April 2011 Pole Attachment Order attaches a list of states that have certified they regulate pole attachments, includes Illinois on the list, and states, “Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part I of the Rules, including the rules adopted in this Order.”<sup>18</sup>

Because the FCC’s rule states that a complaint “shall” be dismissed in the presence of a certification, because the rule provides that the certification is “conclusive proof” of state jurisdiction, and because the April 2011 Pole Attachment Order states such certification preempts FCC jurisdiction over pole attachment complaints, the Order should be reversed and the complaints dismissed.

## **2. The ICC’s December 2018 Letter Does Not Change This Conclusion**

The Order of course points to the ICC’s December 2018 Letter, but that Letter does not have the effect that the Order gave it. Although the Letter suggests a gap in Illinois regulation (on which more just below), the letter does not withdraw the certification. Indeed, the Letter was not adopted in a rulemaking or adjudicatory proceeding, and the Commission should treat it as having little effect.

Moreover, the Order confuses the facts in the ICC’s Letter with the appropriate legal conclusion – for two reasons. *First*, as already noted, the Order’s suggestion that the Letter means that the certification is not “conclusive proof” of lack of jurisdiction is simply unsupported by the rule. Order at 2 (¶ 5). The rule does not permit rebuttal – the certification is

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subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

<sup>18</sup> April 2011 Pole Attachment Order, 26 FCC Rcd 5240, at Appendix C (2011).

“conclusive.” 47 C.F.R. § 1.1405(a). The Order treats the certification as mere evidence, which it is not.

In its response to ComEd’s Motion, Crown Castle argued that the FCC had adopted a procedure by which a party could file at the FCC, notwithstanding a state certification, and place the burden on the defending party to prove state regulation.<sup>19</sup> But in the cited Order, the FCC’s reference to a defendant’s burden is only in those instances where “a state ... has not previously certified its authority.” 14 FCC Rcd 18049, at ¶ 115. More importantly, even if the Order could be read in the manner in which Crown Castle suggests, that would be irrelevant, for the FCC has not amended its regulation, which (as noted) says that a certification means that it “shall” dismiss a complaint because the certification is “conclusive proof” of state jurisdiction. 47 CFR § 1.1405(a). Unambiguous regulations control over agency language in orders (or in any other form). *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (“The regulation in this case, however, is not ambiguous .... To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.”).

*Second*, the ICC’s letter is too narrowly framed for the legal conclusion it (and the Order) have drawn. The ICC’s letter states that it “has not adopted any rules or regulations specifically governing rates, terms, or conditions for attachments by *telecommunications* companies to poles owned by electric utilities ... .” ICC Letter at 2. The ICC then concludes that the ICC is unable to comply with the requirements of section 224(c)(2) and (c)(3) with respect to these specific transactions or entities.” *Id.* It is this legal conclusion that the Order adopts to justify disregarding the FCC’s own rules.

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<sup>19</sup> Crown Castle Opposition at 11-12 (filed July 8, 2019) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 18049, ¶¶ 115-116 (1999)).

The Order both over-reads the Letter and inappropriately adopts the ICC's legal conclusion. As a threshold matter, the ICC of course does have the legal authority to regulate telecommunications companies requesting electric utility pole attachments. The Illinois Public Utilities Act ("PUA") grants the ICC authority over any "lease ... of ... any part of ... [an electric utility's] ... plant, equipment, ... or other property." 220 ILCS 5/7-102(A)(c).<sup>20</sup> The ICC relied on this precise section in initially issuing its pole attachment certification, *see* Ex. B, and the ICC's letter notes that it reserves the right to adopt new rules – a clear statement that the ICC believes it has statutory authority. The Illinois Appellate Court has affirmed that this very provision gives the ICC authority to regulate pole attachments. *See Cable Television Co. v. ICC*, 403 N.E.2d 287, 290 (Ill. App. 2d Dist. 1980) (holding that the ICC has authority over pole attachments because "[t]he Public Utility Act gives the ICC the authority to regulate the leasing or encumbrancing of 'the whole or any part' of the utilities' property").

Beyond mere statutory authority, the ICC's regulations are broad enough to accommodate all pole attachment issues involving electric utilities. Thus, 83 Ill. Admin. Code 315.30 refers to *all* situations "[w]here consent and approval of the Commission to a pole attachment or conduit agreement is required by Section 7-102 of the Act"<sup>21</sup> – and, as noted, section 7-102 applies to all leases of public utility plant and equipment.<sup>22</sup> Indeed, the federal

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<sup>20</sup> 220 ILCS 5/7-102(A)(c) ("(c) No public utility may [without Commission approval or exemption] assign, transfer, lease, mortgage, sell (by option or otherwise), or otherwise dispose of or encumber the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property, but the consent and approval of the Commission shall not be required for the sale, lease, assignment or transfer (1) by any public utility of any tangible personal property which is not necessary or useful in the performance of its duties to the public, or (2) by any railroad of any real or tangible personal property.").

<sup>21</sup> 83 Ill. Admin. Code 315.30(a) & (b).

<sup>22</sup> Commonwealth Edison is not required to file the leases for affirmative, advance approval, 220 ILCS 5/7-102(E), but the ICC still retains jurisdiction over the matters and the statute provides that complaints may be brought to the ICC. As a result, and contrary to the arguments made by Crown Castle below, section 315.30(a) & (b) can be triggered when the parties to a pole attachment agreement have a rate complaint. (If the interpretation were otherwise, no party – even a cable television company – could complain under this Illinois regulation.)

definition of a “pole attachment” (as amended in 1996) covers “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>23</sup> Section 315.30’s simple reference to “pole attachments” is therefore broad enough to cover telecommunications companies (as the Public Utilities Act does). And section 315.30(b) refers to a specific rate calculation. While that rate calculation (in 315.20) refers to cable television rates, nothing in 315.30(b) makes it inapplicable to other pole attachments.

The ICC Letter and the Order are correct that the rules were originally intended to cover cable television companies (as was appropriate in 1978), and the Letter is correct that the ICC has not adopted rules that “specifically” address telecommunications companies’ attachments to electric utility poles. But because section 315.30 is broad enough to cover those attachments, and they need not be “specifically” covered. The ICC of course concludes that the lack of such specificity means there is no reverse preemption, and the Order adopted that view. Order at 2 (¶¶ 4, 5). But the ICC’s legal view should not control the FCC, and the Illinois rules *do* meet the requirements of section 224 because they do regulate rates and other conditions of all pole attachments.

### **3. The Order’s View that Dismissal Would Be Meaningless Is Wrong**

Giving credence to the ICC Letter’s legal conclusion (as it should not have), the Order also erroneously concluded that granting the motion to dismiss “would simply delay the inevitable result of jurisdiction reverting back to the Commission.” Order at 3 n.19 (¶ 5). This is quite incorrect, because it accords finality to the ICC’s procedurally odd letter. As noted, the

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<sup>23</sup> 47 U.S.C. § 224(a)(4).



ICC's Letter did not come from any rulemaking or other administrative proceeding, and the ICC did not invite or receive any comments.

To be sure, if the FCC dismissed its complaints and Crown Castle refiled with the ICC, the ICC might say again that it has no rules to cover the complaint. (The ICC could not say that it has no jurisdiction; that jurisdiction is conferred by the Illinois PUA.) But the ICC might not: after hearing from ComEd, the ICC might conclude that it could hear the complaint. More importantly, if the ICC dismissed, ComEd could then appeal the ICC's decision to the state courts, to argue (as it has here) that the ICC's regulations actually *are* broad enough to cover telecommunications providers. The state courts are the appropriate place to resolve a dispute over the scope of state law and the ICC's regulations.

Although this may delay the matter's returning to the FCC, the FCC itself has recognized that any such delay is entirely consistent with the federalism values in section 224. "The legislative history [of section 224] states that 'The FCC shall defer to any State regulatory program under color of State law, even if debate or litigation at the State level is in progress ....'"<sup>24</sup>

#### **B. The Order Changes Settled Expectations and Creates Unreasonable Uncertainty**

The FCC has never previously held that a state's certification may be challenged at the FCC on a case-by-case basis. And the Order creates uncertainty over the current regime.

From 1978 to 1996, section 224 defined "pole attachment" as any attachment by a cable television provider to a pole, duct, conduit, or right-of-way owned or controlled by a utility.<sup>25</sup>

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<sup>24</sup> Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585, 1601 (1978) (quoting S. Rep. No. 95-580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 17 (1977)), *aff'd*, *Monongahela Power v. FCC*, 655 F.2d 1254 (1981) (following subsequent administrative action).

<sup>25</sup> *Id.* at (a)(4).

With the passage of the Telecommunications Act of 1996, Congress broadened the Commission's jurisdiction to include "access" to poles and to cover attachments not only by cable companies but also by telecommunications carriers. But the statutory changes to section 224 did not require the states to certify that they regulate "access" to poles or "specifically" that they regulate attachments by telecommunications carriers. And nothing in the 1996 Act required states that had certified previously that they regulate pole attachments to re-certify that they now regulate "access" to poles and that they now regulate attachments by telecommunications carriers. Nor was there any direction from the FCC to the states that they must re-certify. Accordingly, the ICC did not re-certify that it regulated pole attachments following passage of the *1996 Act*.

Neither did any other state.<sup>26</sup> While a handful of states (totaling only four) either re-certified, amended prior certifications, or filed to certify jurisdiction for the first time over pole attachments after the passage of the 1996 Act, none of them re-certified after their initial certification specifically to address the expanded jurisdiction over attachments in the 1996 Act. For example, the Massachusetts Department of Telecommunications and Cable updated its pole attachment certification in 2010 to share its pole attachment jurisdiction with the existing Massachusetts Department of Public Utilities, but did not mention anything about covering "access" to poles or attachments by telecommunications carriers.<sup>27</sup>

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<sup>26</sup> On May 19, 2010, the FCC established Docket 10-101 to collect and maintain state pole attachments certifications and addenda. We checked all 264 entries in this docket and were unable to identify any that re-certified assertions of jurisdiction over pole attachments following the passage of the *1996 Act*. See *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 25 FCC Rcd 5541 (2010).

<sup>27</sup> See *WC Docket No. 10-101, States That Have Certified That They Regulate Pole Attachments*, Commonwealth of Massachusetts, Dept. of Telecommunications and Cable, Aug. 25, 2010 (available at <https://ecfsapi.fcc.gov/file/7020910618.pdf>).

Both Arkansas<sup>28</sup> and New Hampshire<sup>29</sup> filed to certify their jurisdiction over pole attachments after the passage of the 1996 Act, but only certified that they adopted rules governing the rates, terms and conditions for pole attachments, consistent with the limited certification requirement in the statute.

Similarly, no re-certifications by any state appeared following the FCC's decision in its April 2011 Pole Attachment Order that the Pole Attachment Act should be interpreted to give the FCC jurisdiction over attachments by incumbent local exchange carriers (ILECs) to electric utility poles.<sup>30</sup> The FCC's newfound jurisdiction over these "joint use" agreements between ILEC and electric utility pole owners was at odds with the FCC's previous understanding that it lacked such jurisdiction. Nevertheless, as with the 1996 Act's changes in jurisdiction, the FCC did not tell the states that they must re-certify that they have jurisdiction over such ILEC attachments, and no state submitted any such re-certification.

In short, Congress intended that Illinois' certification that it regulates pole attachments has the effect of occupying the entire field of pole attachment regulation, so that the ICC has exclusive jurisdiction to regulate pole attachments, leaving no such regulation for the FCC. The fact that neither Congress nor the FCC required states to re-certify following the *1996 Act* and the 2011 Pole Attachment Order, and that no state actually did re-certify, supports this interpretation.

The Enforcement Bureau's Order upsets settled practice concerning the scope of a certification – and it contradicts Congress's intent and the plain meaning of the FCC's rules, as

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<sup>28</sup> See *Arkansas Certification of Regulations of the Rates, Terms and Conditions of Pole Attachments*, Arkansas Public Service Commission, Oct. 20, 2008 (available at <https://ecfsapi.fcc.gov/file/7020460248.pdf>).

<sup>29</sup> See *Certification of State-Law Regulations of Utility Pole Attachments Pursuant to 47 U.S.C. § 224(c) and 47 C.F.R. § 1.1414*, State of New Hampshire, Public Utilities Commission, Jan. 23, 2008 (available at <https://ecfsapi.fcc.gov/file/7020456133.pdf>).

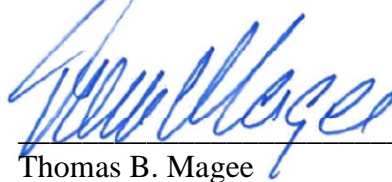
<sup>30</sup> April 2011 Pole Attachment Order, 26 FCC Rcd 5240, 5328 at ¶ 203 (2011).

discussed above. The Order invites piecemeal litigation of the scope of state regulation – and in encourages such cases to be first filed at the FCC, bypassing the states’ opportunity to definitely rule, in a contested or rulemaking proceeding, on its own law. The FCC should not invite such additional federal litigation, where section 224 clearly makes its role secondary.

### **CONCLUSION**

For the foregoing reasons, Commonwealth Edison Company respectfully requests that the Commission grant this application for review and reverse the July 15, 2019 Enforcement Bureau Order.

Respectfully submitted,



---

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Timothy A. Doughty  
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*Attorneys for Commonwealth Edison Company*

August 14, 2019

# **EXHIBIT A**

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Crown Castle Fiber LLC,	)	
	)	Proceeding Numbers 19-169
Complainant,	)	19-170
	)	
v.	)	Bureau ID Numbers EB-19-MD-004
	)	EB-19-MD-005
Commonwealth Edison Company,	)	
	)	
Defendant.	)	

**ORDER**

**Adopted: July 15, 2019**

**Released: July 15, 2019**

By the Chief, Enforcement Bureau:

1. On June 19, 2019, Crown Castle Fiber LLC (Crown Castle) filed two pole attachment complaints against Commonwealth Edison Company (ComEd).<sup>1</sup> The complaints allege that Crown Castle provides telecommunications services pursuant to authority issued by the Illinois Commerce Commission (ICC)<sup>2</sup> and that ComEd is an electric utility that owns or controls poles in Illinois.<sup>3</sup> Crown Castle asserts that ComEd violated section 224 of the Communications Act of 1934, as amended (Act), and the Commission's rules by unlawfully denying Crown Castle access to ComEd's poles<sup>4</sup> and by charging unlawful rates for Crown Castle's attachments.<sup>5</sup>

2. On June 28, 2019, ComEd filed a consolidated motion to dismiss both cases for lack of jurisdiction.<sup>6</sup> ComEd also asks the Commission to hold both cases in abeyance pending a decision on its motion to dismiss.<sup>7</sup> ComEd argues that the Commission lacks jurisdiction over Crown Castle's

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<sup>1</sup> Pole Attachment Complaint for Denial of Access, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (June 19, 2019) (Access Complaint); Pole Attachment Complaint – Unlawful Rates, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (June 19, 2019) (Rate Complaint).

<sup>2</sup> Access Complaint at 2, para. 5; Rate Complaint at 1-2, para. 3.

<sup>3</sup> Access Complaint at 2, para. 8; Rate Complaint at 2, para. 6.

<sup>4</sup> See, e.g., Access Complaint at 39-41, paras. 176-88.

<sup>5</sup> See, e.g., Rate Complaint at 26-27, paras. 89-94.

<sup>6</sup> Motion to Dismiss for Lack of Jurisdiction, Proceeding Numbers 19-169, 19-170, Bureau ID Numbers EB-10-MD-004, EB-19-MD-005 (June 28, 2019) (Motion to Dismiss). On July 8, 2019, Crown Castle filed identical oppositions to ComEd's Motion to Dismiss in each proceeding. See Opposition to Motion to Dismiss, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (July 8, 2019); Opposition to Motion to Dismiss, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (July 8, 2019) (collectively Opposition).

<sup>7</sup> Motion to Hold Proceedings in Abeyance, Proceeding Numbers 19-169, 19-170, Bureau ID Numbers EB-10-MD-004, EB-19-MD-005 (June 28, 2019) (Abeyance Motion). ComEd filed a consolidated Abeyance Motion in the

(continued....)

complaints because the ICC has preempted Commission jurisdiction over *all* pole attachment disputes under section 224(c) of the Act.<sup>8</sup> We disagree.

3. Section 224(c) allows a state to preempt Commission jurisdiction over rates, terms, and conditions, or access to poles by taking the actions specified in that section.<sup>9</sup> Section 224(c)(3)(A) provides that “a State shall not be considered to regulate the rates, terms, and conditions for pole attachments . . . unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.”<sup>10</sup> Likewise, section 1.1405 of the Commission’s rules provides that it will be rebuttably presumed that a state is not regulating pole attachments if the Commission does not receive certification from the state that it “regulates rates, terms and conditions for pole attachments,”<sup>11</sup> and that it “has issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments.”<sup>12</sup>

4. A Notice that the ICC filed with the Commission on December 12, 2018, contradicts ComEd’s contention that the ICC has jurisdiction over all pole attachment disputes.<sup>13</sup> The Notice “clarif[ies] that the [ICC] has not adopted any rules or regulations specifically governing rates, terms, or conditions for attachments by *telecommunications* companies to poles owned by electric utilities and therefore lacks regulatory authority over attachments by *telecommunications* companies to poles owned by electric utilities.”<sup>14</sup> The Notice thus confirms that “the ICC is unable to comply with the requirements of Section 224(c)(2) and (c)(3) with respect to these specific transactions or entities.”<sup>15</sup>

5. We reject ComEd’s argument that a certification the ICC filed with the Commission in 1985 provides “conclusive proof” under Rule 1.1405 that the Commission lacks jurisdiction over this pole attachment dispute.<sup>16</sup> Although the 1985 Certification states that the ICC “has issued and made effective rules” implementing the state’s “regulatory authority over pole attachments,”<sup>17</sup> the 2018 Notice makes clear that these rules “do not specifically govern telecommunications companies’ attachments to poles owned by electric utilities.”<sup>18</sup> Collectively, the 1985 Certification and the Notice demonstrate that the

(Continued from previous page) \_\_\_\_\_  
proceedings. Crown Castle filed identical oppositions to the Abeyance Motion in each proceeding on July 8, 2019. See Opposition to Motion to Hold Proceedings in Abeyance, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (July 8, 2019); Opposition to Motion to Hold Proceedings in Abeyance, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (July 8, 2019) (collectively Abeyance Opposition).

<sup>8</sup> Motion to Dismiss at 2-10.

<sup>9</sup> 47 U.S.C. § 224(c)(1).

<sup>10</sup> *Id.* at § 224(c)(3).

<sup>11</sup> 47 CFR § 1.1405(b)(1).

<sup>12</sup> *Id.* at § 1.1405(b)(3).

<sup>13</sup> Complaint, Exh. B, Dec. 12, 2018, Letter from Phillip Kosanovich, General Counsel, ICC, to Marlene Dortch, Secretary FCC, WC Docket 10-101, *States That Have Certified That They Regulate Pole Attachments* (attaching Oct. 25, 2018, Letter from Brian Sheahan, Chairman, ICC, to Federal Communications Commission (Notice)). The Notice was unanimously approved by the ICC at an open meeting on October 25, 2018, and was filed in the docket the Commission opened for reverse preemption certificates. See Complaint, Exh. C at CCF000120 and CCF000130. See also Opposition at 2-6.

<sup>14</sup> Notice at CCF000117 (emphasis in original).

<sup>15</sup> *Id.* at CCF000118.

<sup>16</sup> Motion to Dismiss at 5 (citing 47 CFR § 1.1405).

<sup>17</sup> *Id.*, Exh. B (1985 Certification).

<sup>18</sup> Notice at CCF000118.

ICC has not exercised preemption jurisdiction over telecommunication attachments to electric utility poles—the very type of pole attachments at issue here. We therefore deny the Motion to Dismiss.<sup>19</sup> We also deny the Abeyance Motion, finding no reason to suspend the schedule of this case.<sup>20</sup>

6. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 1, 4(i), 4(j), 208, and 224 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 224, and sections 1.3, 1.720-1.740 and 1.1401-1415 of the Commission’s Rules, 47 CFR §§ 1.720-1.740, 1.1401-1415, and the authority delegated in sections 0.111 and 0.311 of the Commission’s rules, 47 CFR §§ 0.111, 0.311, that ComEd’s Motion to Dismiss **IS DENIED**.

7. **IT IS FURTHER ORDERED**, pursuant to 1, 4(i), 4(j), 208, and 224 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 224, and sections 1.3, 1.720-1.740 and 1.1401-1415 of the Commission’s Rules, 47 CFR §§ 1.720-1.740, 1.1401-1415, and the authority delegated in sections 0.111 and 0.311 of the Commission’s rules, 47 CFR §§ 0.111, 0.311, that ComEd’s Motion to Hold Proceedings in Abeyance **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold  
Chief  
Enforcement Bureau

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<sup>19</sup> In any event, granting ComEd’s Motion to Dismiss would simply delay the inevitable result of jurisdiction reverting back to the Commission. The ICC has made it clear that it is “unable to comply with the requirements of Section 224(c)(2) and (3) with respect to [the attachments of telecommunications companies to electric utilities]”, and that in the absence of such compliance, “jurisdiction for pole attachments reverts to the FCC.” See Notice at CCF000117-118. See also 47 U.S.C. § 224(c)(3), 47 CFR § 1.1405(f).

<sup>20</sup> See 47 CFR § 1.729(d) (“The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission’s rules, unless staff issues an order suspending such deadlines.”). See also Abeyance Opposition at 1-5.



# **EXHIBIT B**



WC 10-101

August 11, 1978

FILED/ACCEPTED

APR 26 2010

Federal Communications Commission  
Office of the Secretary

Mr. J. M. Talens

Jim:

Attached for your information is a copy of an Illinois Commerce Commission Resolution and Certification adopted April 5, 1978, concerning its jurisdiction over pole attachments, etc. Based upon our earlier conversation, I am under the impression you do not have this.

DOCKET FILE COPY ORIGINAL

A handwritten signature in black ink, appearing to read "A. E. Ross".

A. E. Ross

A. E. Ross, Jr.

6917

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission  
on its own motion

In the matter of Public Utility pole : 78-R4  
attachments for Cable Television Services :  
pursuant to Amendment of the Communications :  
Act of 1934; set forth in Section 224(c) :  
paragraphs (1) and (2). :

RESOLUTION AND CERTIFICATION

WHEREAS, the Communications Act of 1934 has been amended to permit regulation by the Federal Communications Commission of rates, terms and conditions of Public Utility pole attachments by cable television systems to a pole, duct, conduit or right-of-way owned or controlled by the Public Utility; and

WHEREAS, the amended legislation, Section 224(c), paragraphs (1) and (2) does not apply or give authority to the Federal Communications Commission to regulate such attachments with respect to rates, terms, and conditions in a State which regulates the rates, terms, and conditions of such attachments; and

WHEREAS, pursuant to the authority vested in this Commission by virtue of the Illinois Public Utilities Act, Chapter 111-2/3, Section 1, et seq. of the Illinois Revised Statutes, every assignment, transfer, lease, mortgage, sale, or contract of franchise, licenses, permits, plant, equipment, or other property of any public utility, as defined in Section 10.3 of said Act, is subject to the review of this Commission; and

WHEREAS, this Commission does regulate the rates, terms, and conditions for pole attachments to the poles, ducts, conduits, or right-of-ways owned or controlled by public utilities, as defined above;

THEREFORE, BE IT RESOLVED AND CERTIFIED TO THE FEDERAL COMMUNICATIONS COMMISSION that the Illinois Commerce Commission of the State of Illinois does regulate rates, terms, and conditions for pole attachments to the poles, ducts, conduits, or right-of-ways owned or controlled by public utilities, as defined in the Illinois Public Utilities Act, and in so regulating such rates, terms, and conditions the State of Illinois through the Illinois Commerce Commission has the authority to consider and does consider the interests of the subscribers of cable television services in Illinois as well as the interests of consumers of utility services in Illinois.

BE IT FURTHER RESOLVED that a copy of this Resolution and Certification be forwarded to the Federal Communications Commission at 1919 "M" Street, Washington, D.C.

Adopted by this Commission this 5th day of April, 1978.

(S E A L)

(SIGNED) CHARLES P. KOCORAS

# **EXHIBIT C**



FILED/ACCEPTED

APR 26 2010

Federal Communications Commission  
Office of the Secretary

STATE OF ILLINOIS  
Illinois Commerce Commission

527 EAST CAPITOL AVENUE  
SPRINGFIELD, ILLINOIS 62706

WC 10-101  
RECEIVED

MAY 28 1985

ENFORCEMENT DIVISION

May 24, 1985

DOCKET FILE COPY ORIGINAL

Margaret Wood, Esq.  
Federal Communications Commission  
Room 6206  
1919 M Street, N.W.  
Washington, D.C. 20554

~~GRANTED~~

~~Chief, Enforcement Division~~

Dear Ms. Wood:

Enclosed is the Illinois Commerce Commission's certification that it has issued and made effective rules and regulations implementing its regulatory authority over pole attachments. This certification was requested by Howard M. Wilchins in his letter of May 15, 1985.

If you have any questions about this certification please contact Patrick Foster of our staff.

Sincerely,

Rose M. Claggett  
Chief Clerk

RMC/ja

Enclosure

WC 10-101

FILED/ACCEPTED

APR 26 2010

Federal Communications Commission  
Office of the Secretary


RECEIVED

MAY 28 1985

ENFORCEMENT DIVISION

CERTIFICATION

I, Rose M. Claggett, Chief Clerk of the Illinois Commerce Commission, hereby certify that the Illinois Commerce Commission has issued and made effective rules and regulations implementing this state's regulatory authority over pole attachments. The attached rules, which include a specific methodology for such regulation, have been duly adopted by the Commission, filed with the Illinois Secretary of State, and made publicly available in Illinois.

  
\_\_\_\_\_  
Rose M. Claggett, Chief Clerk  
Illinois Commerce Commission

## **EXHIBIT D**

STATE OF ILLINOIS



ILLINOIS COMMERCE COMMISSION

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OFFICE OF GENERAL COUNSEL

December 12, 2018

*Via ECFS*

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

RE: WC Docket No. 10-101  
States That Have Certified That They Regulate Pole Attachments

Dear Secretary Dortch:

Federal law reserves to each State exclusive authority to regulate pole attachments if the State certifies to the Federal Communications Commission ("FCC") that it satisfies certain conditions. The Illinois Commerce Commission approved the attached letter, dated October 25, 2018, and directed that it be sent to the FCC.

Should you or other FCC officials have questions or concerns, or should you require additional information, I can be reached at (312) 793-2846 or at [Phillip.Kosanovich@illinois.gov](mailto:Phillip.Kosanovich@illinois.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "Phillip Kosanovich".

Phillip Kosanovich  
General Counsel, Illinois Commerce Commission

Enclosure





State of Illinois

## Illinois Commerce Commission

Brien J. Sheahan  
Chairman

160 North LaSalle Street  
Chicago, Illinois 60601

October 25, 2018

Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: **ICC Lack of Authority Over Telecommunications Attachments**

To Whom It May Concern:

The purpose of this letter is to clarify that the Illinois Commerce Commission ("ICC") has not adopted any rules or regulations specifically governing rates, terms, or conditions for attachments by *telecommunications* companies to poles owned by electric utilities and therefore lacks regulatory authority over attachments by *telecommunications* companies to poles owned by electric utilities.

Section 224(c)(1) of the federal Communications Act (the "Act") provides that the Federal Communications Commission ("FCC") does not have jurisdiction over rates, terms, and conditions of pole attachments "where such matters *are regulated* by a [s]tate."<sup>1</sup> According to Section 224(c)(3) of the Act and Section 1.1414(a) of the FCC's Rules, a state will not "be considered to regulate the rates, terms, and conditions for pole attachments unless the [s]tate *has issued and made effective* rules and regulations implementing the [s]tate's regulatory authority over pole attachments," including a specific methodology for such regulation.<sup>2</sup> As the FCC has previously noted on multiple occasions, Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the FCC if a state has not implemented such rules and regulations.<sup>3</sup>

The ICC issued certification to the FCC on April 5, 1978, stating that it has met the criteria specified under Section 224(c) to reverse preempt regulation of pole attachments. The ICC's pole attachment rules were adopted in 1985 and subsequently amended in 1994. These rules, which are set forth in Section 315.10 through 315.70 of Title 83 of the Illinois Administrative Code, apply to attachments by "cable television ("CATV") companies" to electric utilities and local exchange

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<sup>1</sup> 47 U.S.C. § 224(c)(1) (emphasis added).

<sup>2</sup> 47 U.S.C. § 224(c)(3) (emphasis added); 47 C.F.R. § 1.1414(a).

<sup>3</sup> See e.g., *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6781 n. 20 (Feb. 6, 1998); see also *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CS Docket No. 97-151, 12 FCC Rcd 11725, 11727 n. 13 (Aug. 12, 1997).

telecommunications carriers and omit any mention of attachments by *telecommunications* companies.<sup>4</sup>

As noted, the ICC's rules do not specifically govern telecommunications companies' attachments to poles owned by electric utilities therefore the ICC is unable to comply with the requirements of Section 224(c)(2) and (c)(3) with respect to these specific transactions or entities.

While the ICC has not promulgated rules specifically governing telecommunications companies' attachments to poles owned by electric utilities, the ICC has established rates, terms and conditions for access by telecommunications carriers to the poles of incumbent local exchange carriers.<sup>5</sup> Moreover, Section 13-514 of the Illinois Public Utilities Act ("IPUA") serves as a basis for a finding of unreasonable access by telecommunications carriers to the poles of both incumbent and competitive local exchange carriers and Section 13-514 of the IPUA provides for prompt resolution, within 60 days of filing, of a complaint alleging a violation of Section 13-514. Thus, Illinois has procedures in place for resolving on a prompt basis access complaints by telecommunications providers seeking access to poles owned by both incumbent and competitive local exchange carriers.

Note, however, while the ICC has not promulgated rules specifically governing telecommunications providers' attachments to poles owned by electric utilities, it reserves the right to promulgate effective rules and regulations over telecommunications companies' attachments to poles owned by electric utilities in the future.

Sincerely,



Brien Sheahan  
Chairman, Illinois Commerce Commission

cc: Adam Copeland (via email)

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<sup>4</sup> See 83 Ill. Admin. Code 315.10 (a) ("The purpose of this Part is to designate a presumptive methodology for computation of annual rental rates to be paid by cable television ('CATV') companies to electric utilities and local exchange telecommunications carriers (collectively 'regulated entities') . . . for the use of space on distribution poles for attachment of CATV cables and associated facilities.").

<sup>5</sup> See, e.g., Order, Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0397, 2001 Ill. PUC Lexis 855 (August 14, 2001)

# **EXHIBIT E**

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BEFORE THE  
ILLINOIS COMMERCE COMMISSION  
PUBLIC UTILITIES REGULAR OPEN MEETING  
Thursday, October 25, 2018  
Chicago, Illinois  
  
Met pursuant to notice at 10:30 a.m. at 160  
North LaSalle Street, Chicago, Illinois.  
  
PRESENT:  
  
BRIEN J. SHEAHAN, Chairman  
JOHN R. ROSALES, Commissioner  
D. ETHAN KIMBREL, Commissioner  
ANASTASIA PALIVOS, Acting Commissioner  
  
  
SULLIVAN REPORTING COMPANY  
BY: JO ANN KROLICKI, CSR  
License No. 084-002215

1                   CHAIRMAN SHEAHAN: Good morning. Pursuant  
2 to the Open Meetings Act, I call the October 25,  
3 2018, Regular Open Meeting to order. Commissioners  
4 Rosales, Kimbrel, and Acting Commissioner Palivos are  
5 with me in Chicago. Commissioner Oliva is absent due  
6 to her participation in a neighborhood program.

7                   We have no requests to speak, and I  
8 will, therefore, move into our Public Utilities  
9 Agenda.

10                  There are edits to both the September 20th  
11 Policy Session Minutes and the September 24th Special  
12 Open Meeting Minutes.

13                  Are there any objections to approving  
14 the Minutes as edited?

15                  (No response.)

16                  CHAIRMAN SHEAHAN: Hearing none, the  
17 Minutes are approved.

18                  Item E-1 concerns ComEd's Filing to  
19 Revise the Primary Underground Service Standard for  
20 Nonresidential Customers.

21                  Are there any objections to not  
22 suspending the filing?

1 (No response.)

2 CHAIRMAN SHEAHAN: Hearing none, the filing  
3 is not suspended.

4 Item E-2 concerns a Citation  
5 Proceeding into Star Energy Partners Sales,  
6 Solicitation, Marketing and Enrollment Practices.

7 I'll recuse myself from this vote.

8 Is there a Motion to Approve the  
9 Proposed Order initiating the citation proceeding?

10 COMMISSIONER ROSALES: So moved.

11 CHAIRMAN SHEAHAN: Is there a second?

12 ACTING COMMISSIONER PALIVOS: Second.

13 CHAIRMAN SHEAHAN: Any discussion?

14 (No response.)

15 CHAIRMAN SHEAHAN: All those in favor say  
16 aye.

17 (Chorus of ayes.)

18 CHAIRMAN SHEAHAN: Opposed, say nay.

19 (No response.)

20 CHAIRMAN SHEAHAN: I abstain. The vote is  
21 three ayes, one abstention. The Order is approved.

22 Item E-3 concerns a Citation

1       Proceeding into National Gas and Electric Sales,  
2       Solicitation and Marketing Enrollment Practices.

3                   Are there any objections to approving  
4       the Proposed Order initiating the citation  
5       proceeding?

6                   (No response.)

7                   CHAIRMAN SHEAHAN:   Hearing none, the Order  
8       is approved.

9                   Item E-4 concerns an investigation  
10      into Sperian Energy's Practices.

11                   Are there any objections to approving  
12      the Proposed Order approving that?

13                   (No response.)

14                   CHAIRMAN SHEAHAN:   Hearing none, the Order  
15      is approved.

16                   Item E-5 concerns a Consumer  
17      Complaint Against ComEd.   Are there any objections to  
18      granting the Joint Motion to Dismiss?

19                   (No response.)

20                   CHAIRMAN SHEAHAN:   Hearing none, the joint  
21      motion is granted.

22                   Item E-6 --

1 CHIEF CLERK: I'm sorry. Mr. Chairman, we  
2 can still barely hear you. We can hear the other  
3 three. Is there a chance you might move the  
4 microphone over from the vacant microphone?

5 CHAIRMAN SHEAHAN: Sure.

6 We're onto Item Number E-6. Is that  
7 audio quality better?

8 CHIEF CLERK: Much, thank you very much.

9 CHAIRMAN SHEAHAN: Item E-6 concerns  
10 Mt. Carmel's Reconciliation of Revenues Collected  
11 Under Its Fuel Adjustment Charges.

12 Are there any objections to approving  
13 the Proposed Order approving the reconciliation?

14 (No response.)

15 CHAIRMAN SHEAHAN: Hearing none, the Order  
16 is approved.

17 Item E-7 concerns Ameren's  
18 Reconciliation of Revenues Collected Under Its  
19 Transmission Service Rider.

20 Are there any objections to approving  
21 the Proposed Order approving the reconciliation?

22 (No response.)



1                   CHAIRMAN SHEAHAN:   Hearing none, the Order  
2   is approved.

3                   Items E-8 and -9 concern Applications  
4   For Authority to Operate As Agents, Brokers, and  
5   Consultants.

6                   Are there any objections to  
7   considering these items together and approving the  
8   Proposed Orders?

9                   (No response.)

10                  CHAIRMAN SHEAHAN:   Hearing none, the Orders  
11   are approved.

12                  Items E-10 through -12 concern  
13   Applications For Authority to Install, Maintain, or  
14   Repair Electric Vehicles.

15                  Are there any objections to  
16   considering these items together and approving the  
17   Proposed Orders?

18                  (No response.)

19                  CHAIRMAN SHEAHAN:   Hearing none, the Orders  
20   are approved.

21                  Item E-13 concerns American Power and  
22   Gas of Illinois' Petition For Confidential Treatment

1 of Its Annual Dekatherm Report.

2 Are there any objections to approving  
3 the Proposed Order approving the petition?

4 (No response.)

5 CHAIRMAN SHEAHAN: Hearing none, the Order  
6 is approved.

7 Items E-14 and -15 concern  
8 Applications for Authority to Operate as Alternative  
9 Electric Suppliers.

10 Are there any objections to  
11 considering these items together and approving the  
12 Proposed Orders?

13 (No response.)

14 CHAIRMAN SHEAHAN: Hearing none, the Orders  
15 are approved.

16 Item E-16 concerns IPA's Petition for  
17 Approval of Its Illinois Solar For All Supplemental  
18 Funding Plan.

19 Are there any objections to approving  
20 the Proposed Order approving the petition?

21 (No response.)

22 CHAIRMAN SHEAHAN: Hearing none, the Order

1 is approved.

2 Item E-17 concerns Ameren's Request  
3 to Issue Debt Up to \$500,000,000.

4 Are there any objections to approving  
5 the Proposed Order approving the request?

6 (No response.)

7 CHAIRMAN SHEAHAN: Hearing none, the Order  
8 is approved.

9 Items E-18 through -50 concern  
10 Applications For Authority to Install Energy  
11 Efficiency Measures.

12 Are there any objections to  
13 considering these items together and approving the  
14 Proposed Orders?

15 (No response.)

16 CHAIRMAN SHEAHAN: Hearing none, the Orders  
17 are approved.

18 Item G-1 concerns Mt. Carmel's  
19 Reconciliation of Revenues Collected Under Its Gas  
20 Adjustment Charges.

21 Are there any objections to approving  
22 the Proposed Order approving the reconciliation?

1 (No response.)

2 CHAIRMAN SHEAHAN: Hearing none, the Order  
3 is approved.

4 Items G-2 through -4 concern Various  
5 Alternative Suppliers Petition for the Confidential  
6 Treatment of Annual Reports.

7 Are there any objections to  
8 considering these items together and approving the  
9 Proposed Orders?

10 (No response.)

11 CHAIRMAN SHEAHAN: Hearing none, the Orders  
12 are approved.

13 Items T-1 through -5 concern Various  
14 Telecom Providers Petitions to Cancel Authority to  
15 Provide Various Telecommunication Services.

16 Are there any objections to  
17 considering these items together and approving the  
18 Proposed Orders?

19 (No response.)

20 CHAIRMAN SHEAHAN: Hearing none, the Orders  
21 are approved.

22 Item T-6 concerns Wabash Independent

1 Networks Respond Communications and Montrose Mutual  
2 Telephone Company's Joint Application for the  
3 Approval of a Reorganization.

4 Are there any objections to approving  
5 the Proposed Orders approving the application?

6 (No response.)

7 CHAIRMAN SHEAHAN: Hearing none, the Order  
8 is approved.

9 Item W-1 concerns Illinois American's  
10 Reconciliation of Revenues Collected Under Its  
11 Qualified Infrastructure Plant Rider.

12 Are there any objections to approving  
13 the Proposed Order approving the reconciliation?

14 (No response.)

15 CHAIRMAN SHEAHAN: Hearing none, the Order  
16 is approved.

17 Item M-1 concerns an ICC initiated  
18 proceeding against Keller Construction.

19 Are there any objections to the  
20 Proposed Order initiating the proceeding?

21 (No response.)

22 CHAIRMAN SHEAHAN: Hearing none, the Order

1 is approved.

2 Item 0-1 concerns a letter to the  
3 Federal Communications Commission.

4 Are there any objections to approving  
5 the letter?

6 (No response.)

7 CHAIRMAN SHEAHAN: Hearing none, the letter  
8 is approved.

9 We're going to hold 0-2.

10 Judge Teague-Kingsley, do you have  
11 any other matters to bring before the Commission this  
12 morning?

13 JUDGE TEAGUE-KINGSLEY: No, Mr Chairman.

14 CHAIRMAN SHEAHAN: Hearing none, we stand  
15 adjourned. Thank you.

16 (WHEREUPON, the above  
17 matter was adjourned.)

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## CERTIFICATE OF SERVICE

I, Kathleen M. Slattery, hereby certify that on this 14<sup>th</sup> day of August 2019, a true and authorized copy of Commonwealth Edison Company's Application for Review was served on the parties listed below via electronic mail and was filed with the Commission via ECFS.

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/s/

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Kathleen M. Slattery